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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 332

STOCKARD STEAMSHIP CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners [1] pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered by the court

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[1] The cases below were decided *sub nom. American-Foreign Steamship Corporation, et al.* v. *United States.* The petitioners herein, in addition to the above named, are A. H. Bull Steamship Co., *et al.;* New York and Cuba Mail Steamship Company; Dichmann, Wright & Pugh, Inc.; Polarus Steamship Co., Inc.; A. L. Burbank & Company, Ltd.; T. J. Stevenson & Co., Inc., North Atlantic and Gulf Steamship Co. (two cases); Luckenbach Steamship Company, Inc.; Blidberg Rothchild Co., Inc.; and Fall River Navigation Company (two cases).

en banc, in a group of fourteen cases on May 26, 1961. This petition covers thirteen of the cases. A separate petition was filed August 5, 1961, in *American-Foreign Steamship Corporation* v. *United States* (No. 290).

OPINIONS BELOW

1. District Courts

The opinion covering ten of the libels is reported as *A. H. Bull Steamship Co.* v. *United States,* 141 F. Supp. 58 (Palmieri, D. J., S.D.N.Y. 1956). The memorandum opinion covering the remaining three libels (Herlands, D.J., S.D.N.Y. 1956) is not reported, but is set forth in a footnote to the opinion of the three-judge panel of the Court of Appeals, *sub. nom. American-Foreign Steamship Corporation, et al.* v. *United States,* dated September 25, 1957, reported at 265 F. 2d 136, at 140.

2. Court of Appeals

The panel opinion of September 25, 1957, as noted above, is reported at 265 F. 2d 136. The opinion on the first rehearing *en banc,* dated July 28, 1958, which was in favor of petitioners, is reported at 265 F. 2d 136, at 144, and is contained in Appendix A *infra,* pp. 1a-26a (hereinafter referred to as "App. A, p. —"). The opinion dated March 26, 1959, denying the Government's petition for further rehearing, is reported at 265 F. 2d 136, at 153.

3. Supreme Court of the United States

The opinion of this Court, dated June 20, 1960, vacating the *en banc* decision on the ground that Judge Medina was ineligible to participate therein, is reported at 363 U. S. 685.

4. Court of Appeals Upon Remand

The opinion of the Court of Appeals, dated May 26, 1961, adverse to petitioners and here sought to be reviewed, is not yet reported, but is set forth in Appendix A, pp. 27a-68a. The judgments of the Court of Appeals appear in Appendix A, pp. 69a-72a.

JURISDICTION

The opinion of the Court of Appeals *en banc* was filed May 26, 1961. No rehearing was requested. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is a clause in a government contract, which provides that the contractor's claim for payment or refund must await final audit of his account, invalid as an attempt unlawfully to extend the statute of limitations?

2. May a contractor sue the United States under the Declaratory Judgment Act for a declaration that a contract term is in violation of statute; and if so, is the commencement of the limitations period advanced to the date when the contract is signed?

3. May a government contract lawfully provide that a payment, made under a contract clause which is protested as being in violation of statute, shall be conditional and subject to later suit for its recovery; is such conditional payment a voluntary payment; and is a suit to recover such payment subject to summary dismissal without trial, although the voluntary payment issue has not been raised in the pleadings?

4. Was it error to deprive petitioners of a trial, reject their uncontradicted evidence as to what the

parties intended by a reservation clause in their contract, and summarily decide that most of petitioners' claims were time-barred?

STATUTES INVOLVED

The statutes involved are the Suits in Admiralty Act (46 U.S.C. 741-752), the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1735-1746), the Merchant Marine Act, 1936 (46 U.S.C. 1101-1294), and the Declaratory Judgment Act (28 U.S.C. 2201-2202). The relevant provisions of these acts are set forth in Appendix A, pp. 73a-76a.

STATEMENT

A. THE NATURE OF THE LITIGATION

Petititoners are steamship owners and operators who, between 1946 and 1952, chartered some 225 government-owned merchant vessels under fleet charters from the Maritime Commission and its successor, the Maritime Administration (collectively referred to as "Maritime"), pursuant to section 5(b) of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738), and section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199(a)).[2]

The charter hire paid by petitioners consisted of (1) "basic charter hire," fixed under section 5(b) of the Merchant Ship Sales Act of 1946, at 15 percent per annum of the sales price of each vessel, payable monthly; and (2) "additional charter hire," specified by section 709(a) of the Merchant Marine Act, 1936, to be 50 percent of the cumulative net voyage profits in excess of a return of 10 percent upon the capital required to operate the vessels.

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[2] These sections are set forth in Appendix A, pp. 73a-75a.

In 1946, when the post-World War II chartering program was inaugurated, Maritime announced that additional charter hire would be set at a sliding scale ranging from 50 to 90 percent of profits. Petitioners protested because the sliding scale proposal was in conflict with the mandatory terms of section 709(a) (App. A, p. 34a).[3] Because of this protest Maritime amended Clause 13 of the charters[4] to provide in unqualified terms that any payment of additional charter hire would be preliminary and "such overpayments refunded to the charterer as may be required" upon "final audit"[5] of the charterer's accounting (App. A, pp. 42a, 58a). On this basis the charters were signed.

Further unqualified reservations of rights in respect of all disputes over additional charter hire (including

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[3] Rates of additional charter hire in excess of 50 percent were held to be unlawful in *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956), and *American Export Lines, Inc.* v. *United States*, — C. Cls. — (Case No. 70-56, decided April 7, 1961, rehearing denied July 19, 1961).

[4] The Government's brief, filed November 29, 1960, with the last *en banc* court, stated, at page 48, that the charter was modified in this respect because of the charterers' protests:

> Because of the dispute as to possible violation of the statutes, Maritime changed the language [of the charter] to make it even clearer that suit should be filed at once.

[5] Clause 13 provided in part:

> The Charterer agrees to make preliminary payments to the Owner . . . at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required. (App. A, pp. 34a-35a).

specifically disputes based on deviations from the statutes)[6] were contained in regulations, and accounting instructions.[7] See 46 C.F.R. 299.31(k)(l); 46 C.F.R. 299.39(a), (b); 46 C.F.R. 299.40(c); 46 C.F.R. 299.56(b)(5).[8]

Tentative accountings for profits and losses from vessel operations were regularly prepared and submitted by the charterers both before and after the chartered vessels were redelivered. Preliminary payments or refunds of additional charter hire were made from time to time in accordance with these statements. If a statement showed an increase in cumulative profit over the previous statement, the charterer made a further payment; if the statement showed a decrease in cumulative profit, so that the amount of additional charter hire already paid was more than was required, the charterer was entitled to a refund. (See typical sched-

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[6] For example, the regulations stated (46 C.F.R. 299.56(b)(5)):

> That if, in any instance, the rules and regulations prescribed herein should conflict with the provisions of an applicable statute or agreement, such provisions shall govern.

[7] Petitioners' payments were made in accordance with the following instruction which Maritime sent to all charterers (App. A, p. 10a):

> Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is on account of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreement involved or otherwise.

[8] 1954 Edition.

ule of payments and refunds of petitioner T. J. Stevenson & Co., Inc., App. A, p. 79a.)

During this period certain of Maritime's interpretations of the statutes and charters gave rise to disputes in addition to the sliding scale problem.[9] Nevertheless, Maritime urged the charterers to continue making payments of additional charter hire, pointing out that payments were conditional under Clause 13, and that their rights to recover were reserved until final audit (C.A. Rec. Blidberg, pp. 59-60, 69, 107-109, 111-112, 115-125).[10] Most of the charterers accordingly made preliminary payments pursuant to Maritime's theories, as required by the charters, but all subject to the unqualified reservations in Clause 13, and the regulations and instructions.[11]

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[9] These later disputes involved, *inter alia*, the issue of cumulation. Maritime permitted losses to be carried forward and offset against profits in later years, but did not permit losses to be offset against earlier profits. Petitioners believe that Maritime has misconstrued the cumulative accounting provision of section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199(a)) and of the charters. Maritime also required the year 1947 to be divided into two parts for the purpose of computing additional charter hire, contrary to these cumulative accounting provisions. Other disputes are summarized in the opinions below. (App. A, pp. 35a-36a.)

[10] The record of the Court of Appeals consists of fourteen sections, thirteen of which, each numbered beginning at page 1, contain the district court proceedings in the individual cases. Reference to these sections is made herein by company, *e.g.* "C.A. Rec. Stockard, p. —." The last section contains the proceedings before the *en banc* court on remand from this Court, including the opinion and judgments. The pages are numbered pages 590a to 702a, and this section is referred to herein as "C.A. Rec., p. —."

[11] However, when the Department of Justice took the position, contrary to that of Maritime, that Clause 13 did not reserve the additional charter hire claims, the charterers had no alternative but to stop making payments.

At final audit, petitioners requested refunds of claimed overpayments of additional charter hire, including amounts admitted to be due on Maritime's own accounting theories. These were refused, and libels were then filed, in each case not later than within two years of final audit (App. A, p. 36a; see also tabulation at 265 F. 2d, at 143). The limitation period specified by section 5 of the Suits in Admiralty Act is two years (App. A, p. 72a).

B. PROCEEDINGS BELOW

1. District Courts

The thirteen libels were filed between April 1954 and February 1956. The Government filed exceptions and exceptive allegations asserting that each libel was time-barred, because filed more than two years after redelivery of the last vessel under the respective fleet charter.[12] The Government showed only the redelivery dates and submitted no other evidence. The district courts denied petitioners' motions to amend the libels to include further allegations of fact bearing on the time-bar issue; sustained the exceptions and exceptive allegations on time-bar; and held that even payments made within two years of the filing of the libels were voluntary and unrecoverable, although no such defense was pleaded. (App. A, p. 47a) The libels were dismissed upon the authority of *Sword Line, Inc.* v. *United States,* 228 F. 2d 344 (2 Cir. 1955), *aff'd,* 231 F. 2d 75, *affirmed as to admiralty jurisdiction,* 351 U.S. 976;

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[12] In its brief to the first *en banc* court, dated January 8, 1958, the Government changed its earlier position and asserted that the statute of limitations began to run (a) on the date of each payment; (b) on the date of redelivery of the last vessel, unless the redelivery preceded publication of Maritime's accounting regulations on March 30, 1950, in which case the cause of action accrued on June 30, 1950; and (c) on a series of other dates.

and *American Eastern Corporation* v. *United States,* 133 F. Supp. 11 (S.D.N.Y. 1955), *affirmed without opinion,* 231 F. 2d 664, *cert. denied,* 351 U.S. 983.

2. Court of Appeals (Panel Decision)

On September 25, 1957, a three-judge panel (Circuit Judges Hincks and Medina and retired District Judge Leibell) affirmed the dismissals, 265 F. 2d 136, citing *Sword Line* and *American Eastern Corporation,* both *supra,* but stating (265 F. 2d, at p. 142):

> If the subject-matter of these appeals were *res nova,* we are by no means sure that our dispositions would coincide with those made by the majority opinion in Sword Line and by American Eastern. . .

3. Court of Appeals (First En Banc Decision)

The first *en banc* court consisted of Chief Judge Clark and Circuit Judges Medina, Hincks, Waterman and Moore, all in regular active service.[13] On July 28, 1958, that court released its three-to-two decision, reversing the district court dismissals, 265 F. 2d 136, at 144 (App. A, pp. 1a-26a).

The majority held that "the rights of the parties to these charters, so far as additional charter hire is concerned, are governed by Clause 13 . . ." (App. A, p. 12a). As to the Government's argument that the words "each final audit" in Clause 13 meant "each annual audit," the court thought that, since this issue had not been raised below, it should be passed upon by the trial court upon proper pleading and proof (App. A, pp. 12a-13a). And the court said, "but we think the text of

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[13] Judge Lumbard declined to participate because of his connection with the litigation in the district court during his tenure as United States Attorney.

Clause 13 is an adequate, *prima facie,* showing of jurisdiction in the absence of pleading and proof by the Government that the libelants' interpretation of Clause 13 is incorrect. . . ." (App. A, p. 13a).

The court found it unnecessary to pass upon the voluntary payment argument, but said, "we observe, however, that carried to its logical conclusion the contention is that every issue going to the merits is jurisdictional. . . ." (App. A, p. 11a, ftn.).

Judges Clark and Waterman dissented, adhering to their views in *Sword Line.* Judge Clark also questioned Judge Medina's eligibility to participate in the decision, because on March 1, 1958, after submission of the case but before decision, he had retired from regular active service under 28 U.S.C. 371(b) (App. A., p. 26a). The Government requested and was denied rehearing, the court dividing as it had in its opinion on the limitations point. 265 F. 2d, at 153.

4. In This Court

On June 20, 1960, this Court (Justices Harlan, Frankfurter and Brennan dissenting) vacated the *en banc* decision, on the ground that Judge Medina was not eligible to participate.[14] It stated, however, "in reaching this conclusion we intimate no view as to the merits of the underlying litigation." 363 U. S. 685, at 691. Petitioners' conditional cross-petition, asking review of the time-bar issue, was denied on June 27, 1960. 363 U. S. 842.

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[14] The Department of Justice has endorsed H.R. 5255 which would make a retired circuit judge eligible to sit *en banc* in the rehearing of a case in which he had previously participated in a panel decision. (See H.R. Rep. 422, 87th Cong., 1st Sess. (May 22, 1961), accompanying H.R. 5255.)

5. Court of Appeals Upon Remand (Second En Banc Decision)

Reargument *en banc* was granted by the Court of Appeals on November 14, 1960 (C. A. Rec. p. 600a). By this time, Judge Hincks had joined Judge Medina in retirement, and Judges Friendly and Smith had become members of the Court of Appeals. The court again split three-to-two, this time for all practical purposes ruling against petitioners on the time-bar issue. Judge Smith wrote what may be considered the majority opinion. Five cases were affirmed; eight were reversed and remanded, with instructions to determine whether there were claims which could be proven within the narrow exception to the time-bar prescribed in the opinion; and one appeal was dismissed. The factual basis for the affirmance or reversal of each individual case was not stated.

Judge Clark, joined by Judge Waterman, wrote a partially concurring-partially dissenting opinion restating his earlier views. Judge Friendly, joined by Judge Moore, dissented, agreeing, with the earlier *en banc* majority opinion of Judges Hincks, Medina and Moore (App. A. pp. 1a-26a) that the time-bar issue with respect to all additional charter hire claims was controlled by Clause 13.

Judge Smtih divided petitioners' claims for refund of excessive charter hire payments into two categories —those based on violation of statute, and those based on breach of charter terms. Ignoring the specific regulations stating otherwise (*supra*, p. 6), he held that the parties could not reasonably have intended the reservation in Clause 13 of the charters to apply to the statutory violation claims including the sliding scale profit sharing claim, which the Government admitted was the very claim that caused Maritime to amend

Clause 13, and even if that were the intent, it was unlawful as an attempt to extend the two-year limitation of the Suits in Admiralty Act; that payments in excess of the statutory requirements were time-barred if made two years before suit, and were voluntary and unrecoverable whenever made. He held, on the other hand, that the Clause 13 reservation was applicable to the breach of charter claims, but that it reserved only claims "brought within two years of preliminary statement or final audit, *whichever was earlier.*" [15] By adding the phrase, "whichever was earlier," which does not appear in Clause 13, he barred claims which even the Government had conceded were open to petitioners.[16]

The other four judges, rejecting Judge Smith's theory of limited applicability, recognized that the language of Clause 13 was unqualified and made no distinction between types of claims. However, Judges

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[15] Emphasis supplied in all quotations unless otherwise indicated.

[16] In *South Atlantic Steamship Line, Inc.* v. *United States* (D. Del.—Adm. Nos. 1735 and 1757), the Government's brief (pp. 14-15) admits that Clause 13 reserved certain disputes until final audit:

> This claim, although obscurely alleged, does not involve violation of the statutes, but obviously refers to a mere matter of acceptance of libelants' cost accounting adjustments for reasonable overhead "under the agreement" itself *and thus does not accrue until adjustment on final audit.* . . . It thus differs entirely from libelant's claims for statute violation and appears not to be dismissable, but to form correctly a part of South Atlantic's next or third cause in libel No. 1757.
>
> This third cause of South Atlantic is for overpayments of $16,432.92 "under respondent's regulations." This cause of action (Arts. 21-22), like the $150 a day overhead ceiling (Art. 7) in effect merely alleges that accepting the legality of the Government's contract and regulations *such an amount is owing to South Atlantic upon making the necessary accounting adjustments on the final audit.* . . .

Clark and Waterman thought that Clause 13 was not intended to reserve any of the claims, and Judges Friendly and Moore thought that Clause 13 was valid and reserved all claims until final audit.

Judge Smith noted the existence of a substantial question as to the propriety of dispensing with a trial and summarily determining the questions of (a) what the parties intended by the reservation in Clause 13, and (b) whether any of the payments were voluntary, particularly since the defense of voluntary payment had not even been pleaded (App. A, pp. 43a-44a, 47a). He thought a trial of the first question was unnecessary in light of his holding that the parties could not lawfully reserve the claims based on violation of the statute. But he denied petitioners a trial by deciding that the claims covered by Clause 13 were intended to be reserved until preliminary statement or final audit, *whichever was earlier,* when Clause 13 contained no such limiting language. As to the defense of voluntary payment, it is not clear whether he held (a) that it was unlawful for Clause 13 to provide that the payments were conditional, and therefore not voluntary, or (b) that the parties did not in fact so agree (which would be a summary determination, depriving petitioners of a trial).[17]

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[17] Judge Smith's opinion was influenced by two other basic factual misconceptions: (a) that the charterers waited almost a decade to sue, and (b) that they might recover interest on their overpayments (App. A., pp. 39a, 40a, 41a). Actually, Maritime itself delayed five years before issuing its accounting regulations. And the Comptroller General repeatedly criticized Maritime not only for this delay but also for its lengthy delays in auditing the charterers' accountings, which could not be submitted until after the regulations were issued. (See H. Doc. No. 46, 81st Cong., 2d Sess., pp. 87-88; H. Doc. No. 472, 82d Cong., 2d Sess., pp. 65-66; H. Doc. No. 383, 83d Cong., 2d Sess., p. 40.) Furthermore, section 5 of the Suits in Admiralty Act (46 U.S.C. 745) prohibits the award of interest for any period prior to suit.

It should be noted that Judges Hincks, Medina, Moore, Friendly and Learned Hand (in his dissent in *Sword Line, supra*) have agreed that petitioners' claims are not time-barred. But the contrary views of Judges Smith, Clark and Waterman have prevailed over those of the other five. And, since the three judges are in substantial disagreement among themselves, it is questionable whether it can be said that there is a majority opinion at all.

REASONS FOR GRANTING THE WRIT

A. THE NEED FOR AN AUTHORITATIVE DECISION

Forty-one cases, including those of these petitioners, based on the same form of charter, are pending in various district courts throughout the United States (App. A, pp. 77a-78a). District courts, other than in the Southern District of New York, have received briefs and heard argument on the time-bar issue in eleven cases and have been waiting for almost four years for a final decision in the instant cases. Other cases are being held in abeyance, likewise awaiting such decision.

But the authoritativeness of the decision below is undermined not only by disagreements among the three judges whose views have prevailed, but also by the fact that their views are contrary to those of the five other circuit judges who have passed upon the same issues. The decision wholly fails to supply the guidance for which other courts have been waiting. And, within the Second Circuit itself, when other similar cases are presented for review, the five judges who have been overruled will have to vote either against the prevailing views or else, out of comity, against their own convictions.

Moreover, as shown below, the decision is in conflict with decisions of other circuits in several substantial respects. The disagreements already present will inevitably engender further conflicts, both within the Second Circuit and with other circuits.

It is therefore appropriate and, we submit, imperative, that this Court put an end to these disagreements by an authoritative resolution of the issues here involved.

B. EFFECT OF DECISION ON GOVERNMENT CONTRACTS

The holding that Clause 13 was unlawful, if it was intended to apply to statutory disputes, has two serious and far reaching consequences. It severely limits the contracting powers of government agencies and it creates doubt as to the validity of existing government contracts, many of which have provisions for final payment or refund upon accounting, audit, or some other event, or provisions requiring the exhaustion of an administrative remedy before bringing suit. Under the decision below, if a contractor's claim is based on a statutory requirement, even if the issue arises after the contract is signed,[18] the claim cannot lawfully be covered by such provisions. As a result, many claims, thought to be reserved, are already time-barred and "the traps for the unwary," against which Judge Friendly warned (App. A, p. 64a), have already sprung shut.

Of like effect is the holding that a government agency may not lawfully agree that payments shall be condi-

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[18] In the instant cases, the issue over the division of 1947 into two parts for accounting purposes arose a year *after* the contract was signed. Judge Smith held that it could not lawfully be covered by Clause 13.

tional, and not voluntary, if they are subject to a dispute as to a statutory requirement.

Adherence to these holdings must necessarily result in making government contracts hazardous, and prudent contractors must hasten to court with a protective suit as each new dispute arises. Thus, for example, if petitioners had sued at the dates of each preliminary statement, as Judge Smith said they should have done to protect their rights, more than a hundred libels might have been filed.[19] Judge Friendly stated the sounder view when he said (App. A, pp. 67a-68a):

> Happily, persons engaged in the performance of complex contracts have learned other ways of working out their differences than constant resort to the courts; they wait until all the disputed items are before them and then generally come to a conclusion no less satisfactory for not being altogether scientific. The law of limitations should encourage this sensible process of adjustment—not require immediate entry into the judicial arena under threat of the expiry of a short statutory bar.

This question of public importance merits review by this Court.

C. AVAILABILITY OF DECLARATORY RELIEF

Another question of great public importance is whether the United States has consented to be sued for a declaratory judgment affecting contract rights and

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[19] Petitioners submitted, as part of their appendix in the court below, detailed statements showing the number and dates of preliminary payments, debits and credits, etc., under the charters. A typical statement for T. J. Stevenson & Co., Inc., is reproduced (App. A, p. 79a). This shows at least twenty-one preliminary payments of additional charter hire for this one petitioner, which would, correspondingly, require twenty-one law suits, instead of one.

liabilities and, if so, whether the availability of declaratory relief moves forward the date of time-bar.

Rule 59 of the General Admiralty Rules, effective July 19, 1961, has resolved the long unsettled question whether declaratory relief is available between private parties in admiralty.[20] But the weight of authority holds that the United States has not consented to be sued for a declaratory judgment.[21] Judge Smith's reliance for such consent on the Administrative Procedure Act (App. A, p. 38a) seems misplaced since section 4 of that Act (5 U.S.C. 1003) expressly excludes applicability to contracts.[22]

But assuming that the United States has consented to be sued for a declaratory judgment, there still re-

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[20] See 2 BENEDICT ON ADMIRALTY (6th ed.) 47-48; *McLain* v. *Lance*, 146 F. 2d 341, 343 (5 Cir. 1944), *cert. denied*, 325 U.S. 855. In the unreported case of *States Marine Lines, Inc.* v. *United States* (N.D. Calif., Doc. No. A 28008, July 20 1960) a suit for declaratory relief was dismissed for want of jurisdiction in admiralty.

[21] See, for example, *Larsen* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Mellos* v. *Brownell*, 250 F. 2d 35, 36 (D.C. Cir. 1957); *Adler* v. *Brownell*, 242 F. 2d 28, 29 (D.C. Cir. 1957); *Ove Gustavsson Contracting Company* v. *Floete*, 278 F. 2d 912, 914 (2 Cir. 1960), *cert. denied*, 364 U.S. 894; *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 870 (9 Cir. 1953); *Marshall* v. *Crotty*, 185 F. 2d 622, 627-8 (1 Cir. 1950); *cf.*, *Land* v. *Dollar*, 330 U.S. 731 (1947). 6 MOORE FEDERAL PRACTICE § 57.21 [1] (2d ed., p. 3123) unqualifiedly states, "the inapplicability of the declaratory judgment procedure to actions *against* the United States is due to the outmoded, but very real, doctrine that the United States cannot be sued without its consent and then only within the precise limits of the consent given." (Emphasis in original.)

There is, however, contrary dictum. *American President Lines, Ltd.* v. *United States*, 265 F. 2d 552 (3 Cir. 1959); *Luckenbach Steamship Company, Inc.* v. *United States*, — C. Cls. — (Case No. 240-59, July 19, 1961).

[22] *Ove Gustavsson Contracting Company* v. *Floete*; *Richfield Oil Corp.* v. *United States*, both *supra*.

mains the question, of great importance in the administration of justice, whether the availability of declaratory relief moves forward the date on which the statute of limitations otherwise would begin to run.

The rule against splitting causes of action [23] forecloses the piecemeal litigation of a multiplicity of disputes that may arise under any substantial contract. Yet Judge Smith's holding makes such piecemeal litigation inescapable, and causes to be already time-barred myriads of claims under other government contracts now awaiting possible adjustment or compromise as an alternative to litigation.

D. THE VOLUNTARY PAYMENT HOLDING IMPAIRS IMPORTANT RIGHTS CONFERRED BY CONGRESS

Judge Smith seemingly held that the parties could not lawfully agree that payments made in excess of the amounts required by statute would be conditional and not voluntary. The effect of this holding is that citizens are left without recourse when administrative agencies diminish or take away benefits conferred by Congress.

The chartering program and other programs were authorized by the Merchant Ship Sales Act of 1946 for the purpose of establishing and maintaining a strong merchant marine (see Declaration of Policy, sec. 2). In aid of this objective, Congress authorized the charter of vessels over which it exercised a substantial monopoly after World War II (App. A, p. 33a). Congress laid down certain of the terms and gave Maritime no discretion to alter them. Maritime therefore could not lawfully require the charterers to agree to more

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[23] *Baird* v. *United States*, 96 U.S. 430 (1878); *New York Scow Corporation* v. *Olsen*, 121 F. 2d 704 (2 Cir. 1941); *Holton* v. *United States*, 65 F. Supp. 903, 906 (C. Cls. 1946); *Myerle* v. *United States*, 33 C. Cls. 1, 21 (1897).

onerous terms.[24] But the holding below that the charterers' payments, in contravention of the terms fixed by Congress, were voluntary, notwithstanding the agreement to the contrary, enables the agency to nullify the congressional mandate with impunity. Under that holding, the charterer must either accept the charter on unlawful terms and waive his statutory rights, or not accept the charter at all.

The doctrine inherent in Judge Smith's decision in denying petitioners a right of recovery, is not confined to the shipping field. It would extend to all situations where a government agency, charged with the administration of a statute or congressional program, either charges a citizen more than Congress specifies, or restricts benefits clearly granted by statute, extracting

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[24] *Sword Line, Inc.* v. *United States*, 228 F. 2d 344 (2 Cir. 1955), *affirmed as to jurisdiction*, 351 U.S. 976 (1956); *A. H. Bull Steamship Co.* v. *United States*, 108 F. Supp. 95 (C. Cls. 1952); *Southeastern Oil Florida, Inc.* v. *United States*, 119 F. Supp. 731 (C. Cls. 1953), *cert. denied*, 348 U.S. 834; *Dichman, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956); *American Export Lines, Inc.* v. *United States*, — C. Cls. — (decided April 7, 1961, rehearing denied July 19, 1961); *Central Gulf Steamship Corporation* v. *United States*, 172 F. Supp. 701 (C. Cls. 1959).

Cases under other statutes:

International Railway Co. v. *Davidson*, 257 U.S. 506 (1922); *Brannan* v. *Stark*, 342 U.S. 451 (1922); *The Swift and Courtney and Beecher Company* v. *United States*, 105 U.S. 691 (1882); *The Swift and Courtney and Beecher Company* v. *United States*, 111 U.S. 22 (1884); *United States* v. *Laughlin*, 249 U.S. 440 (1919); *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200 (1923); *Roberts* v. *United States*, 176 U.S. 221 (1900); *Peoples Bank* v. *Eccles*, 161 F. 2d 636 (D.C. Cir. 1947), *reversed on other grounds*, 333 U.S. 426; *California Electric Power Co.* v. *United States*, 60 F. Supp. 344 (C. Cls. 1945); *United States* v. *Smith*, 39 F. 2d 851 (1 Cir. 1930); *Glavey* v. *United States*, 182 U.S. 595 (1901); *McMath* v. *United States*, 248 U.S. 151 (1918); *United States* v. *Andrews*, 240 U.S. 90 (1916).

an agreement from the citizen as a condition of inducing the agency action, which agreement can be later relied upon to establish the defense of voluntary payment, acquiescence, or estoppel.

E. CONFLICTS WITH OTHER CIRCUITS

1. Summary Disposition

These cases were decided on the libels, supported by affidavits, and the Government's exceptions, alleging only that the suits had not been commenced within two years of the redelivery of the last vessels under charter, from which, the Government initially contended, the time-bar began to run.

Petitioners showed, and Judge Smith noted, that (a) the preliminary accountings, on the basis of which tentative payments or refunds of additional charter hire were made, were subject to substantial change for later losses, for later developed items of income and expense, for foreign agents' accounts, overhead, and results of personal injury and cargo damage litigation (App. A, p. 46a); (b) the regulations, pursuant to which the charterers were to make their accountings, were not issued until February 21, 1950, long after adoption of the form of charter in 1946, and more than two years after redelivery of the last vessels under some of the charters (App. A, p. 46a); (c) subsequent regulations were issued as late as June 1951 affecting the charterers' additional charter hire obligations and their accountings (see 46 C.F.R. 299.37-4(d), (e), (f) and (g), 1954 ed.); (d) standard instructions (quoted *supra,* p. 6), were issued by Maritime requiring charterers to transmit their payments with a letter stating that the same would not be regarded "as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise . . . ," and a

further regulation stating that statutory provisions were to prevail over inconsistent regulations; (e) Maritime consistently demanded payments of additional charter hire from the charterers, stating that they could rely on these regulations and instructions to protect their position, which caused Judge Friendly to comment (App. A, p. 67a, ftn.), "it ill becomes the Government to urge this [that payments were voluntary] in view of its repeated demands that the charterers make the payments and rely on their right to refund on final audit. . . ."; (f) Maritime deposited the additional charter hire payments in an "unearned moneys" trust account (App. A, p. 42a); and (g) as admitted by the Government, Clause 13 was amended to meet the objections of the charterers to the allegedly unlawful sliding scale of additional charter hire. The Government produced no contrary evidence.

Judge Smith recognized the possible ambiguity of Clause 13 (App. A, p. 41a), but, rejecting Maritime's contemporaneous interpretation, resolved that ambiguity against petitioners, and in favor of the Government which had drafted the charters.[25] Although recognizing the questionable propriety of depriving petitioners of a trial, he nevertheless decided that Clause 13 was not intended to and could not lawfully apply to statutory claims, including the very claim in response to which Clause 13 was amended; that it reserved contract claims until the dates of preliminary statements if they were earlier than final audit, although the clause did not so

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[25] The interpretation of Clause 13 as to which the parties had been in agreement should have been given great if not conclusive weight. *Providence Rubber Co.* v. *Goodyear*, 76 U.S. 788, 799 (1870); *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302, 315 (2 Cir. 1955); *American Bemberg Corporation* v. *United States*, 150 F. Supp. 355, 361 (D. Del. 1957).

provide; and that overpayments involved in the statutory claims were voluntary and unrecoverable because they were not or could not lawfully be made subject to the right of later recovery.

Petitioners were entitled to their day in court under the well settled rule stated in *Conley* v. *Gibson,* 355 U. S. 41, 45-46 (1957):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Summary disposition, which deprived petitioners of the trial to which they were entitled under the due process clause of the Fifth Amendment, is in conflict with decisions of every one of the eleven circuits, including the Second.[26]

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[26] D. C. Circuit: *Callaway* v. *Hamilton Nat. Bank of Washington,* 195 F. 2d 556, 559 (1952)

1st Circuit: *Manosky* v. *Bethlehem-Hingham Shipyard,* 177 F. 2d 529, 531 (1949)

2nd Circuit: *Arnstein* v. *Porter,* 154 F. 2d 464, 468 (1946); *Knudsen* v. *Torrington Company,* 254 F. 2d 283, 285 (1958).

3rd Circuit: *Frederick Hart & Co.* v. *Recordgraph Corporation,* 169 F. 2d 580, 581 (1948)

4th Circuit: *Tahir Erk* v. *Glenn L. Martin Co.,* 116 F. 2d 865, 869 (1941)

5th Circuit: *Baldwin* v. *Morgan,* 251 F. 2d 780, 785 (1958)

6th Circuit: *Sherman* v. *Air Reduction Sales Company,* 251 F. 2d 543, 546-547 (1958)

7th Circuit: *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.,* 257 F. 2d 417, 418 (1958)

8th Circuit: *Warner* v. *First National Bank of Minneapolis,* 236 F. 2d 853, 857 (1956), *cert. denied,* 352 U.S. 927

9th Circuit: *Richfield Oil Corporation* v. *United States,* 248 F. 2d 217, 225 (1957)

10th Circuit: *Keenan* v. *Looney,* 227 F. 2d 878, 880 (1955).

2. Voluntary Payment

The decision that overpayments were voluntary is also in conflict with decisions of other circuits, holding that agreements making payments to the Government conditional are valid and binding.[27] And the consideration and determination of the voluntary payment issue, when no such defense had been pleaded, was patently erroneous and in conflict with decisions of this Court and of other circuits,[28] holding that courts may not decide cases on issues which the parties do not raise.

CONCLUSION

The Solicitor General has recognized the need for definitive determination of the time-bar issue and on three occasions has urged the granting of, or acquiesced in, petitions for certiorari.[29] The Second Circuit, to which other courts, faced with the same questions, are looking for resolution, is hopelessly divided and has

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[27] *Richfield Oil Corporation* v. *United States*, 248 F. 2d 217, 223-224 (9 Cir. 1957); *United States* v. *Ohio Oil Co.*, 163 F. 2d 633, 638 (10 Cir. 1947), *cert. denied*, 333 U.S. 833 (1948); *Empire Engineering Co., Inc.* v. *United States*, 59 C. Cls. 904 (1924); *In re New York O. & W. R. Co.*, 178 F. 2d 765, 766 (2 Cir. 1950).

[28] *Reynolds* v. *Stockton*, 140 U.S. 254 (1891); *Webster Eisenlohr* v. *Kalodner*, 145 F. 2d 316, 318 (3 Cir. 1944), *cert. denied*, 325 U.S. 867; *J. P. Jorgenson* v. *Rapp*, 157 Fed. 732, 738-739 (9 Cir. 1907); *Begert* v. *Payne*, 274 Fed. 784, 789 (6 Cir. 1921); *Osage Oil & Refining Co.* v. *Continental Oil Co.*, 34 F. 2d 585, 588 (10 Cir. 1929); *Tractor & Equipment Corporation* v. *Chain Belt Co.*, 50 F. Supp. 1001, 1006 (S.D.N.Y. 1942); *Bower* v. *Casanave*, 44 F. Supp. 501, 507 (S.D.N.Y. 1941).

[29] *Sword Line, Inc.* v. *United States* (No. 861, October Term, 1955); *American Eastern Corp.* v. *United States* (No. 934, October Term, 1955); *American-Foreign Steamship Corp.* v. *United States* and *Stockard Steamship Corp.* v. *United States* (Nos. 322 and 334, October Term, 1959).

failed to settle the issue. Its decision can lead only to confusion, further conflict and more litigation.

Accordingly, petitioners urge that certiorari be granted.

Respectfully submitted,

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